

STATE OF MICHIGAN
COURT OF APPEALS

JOAN ALBERTA SHELLER,

Plaintiff-Appellant,

v

LEISURE LIVING MGT OF GRAND RAPIDS,
INC, d/b/a WHISPERING WOODS,

Defendant-Appellee.

UNPUBLISHED

February 7, 2006

No. 255664

Kent Circuit Court

LC No. 02-010908-NH

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right the grant of summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff was a resident at defendant's adult foster care facility. On the morning of May 14, 2000, defendant's employees found her on the floor beside her bed, on her knees with her face to the floor. Plaintiff later developed pain in her legs, requiring medical evaluation. Plaintiff was admitted to the hospital and diagnosed with dehydration, a urinary tract infection, and cellulitis of the left leg. Plaintiff's condition worsened, resulting in amputation of her left leg on May 16, 2000. She filed a complaint in the instant action alleging negligence and a violation of the Michigan Consumer Protection Act (MCPA). The alleged factual basis for both claims was that defendant had agreed that it would check on plaintiff every two hours but had not, which resulted in circumstances requiring the amputation of plaintiff's leg.

Plaintiff argues on appeal that she submitted sufficient evidence to withstand summary disposition. We disagree. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). The nonmoving party must come forward with specific facts beyond the pleadings that show a genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). "Mere conjecture does not meet the burden of the opposing party to come forward with documentary evidence that a genuine issue of material fact exists." *Little v Howard Johnson Co*, 183 Mich App 675, 683; 455 NW2d 390 (1990). A claim for negligence requires a showing of (1) a duty; (2) breach of that duty; (3) causation; and (4) damages. *Haliw v Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). There is no dispute that defendant owed plaintiff a duty and that plaintiff has damages.

Plaintiff's only evidence of breach of duty is the deposition testimony of plaintiff's husband and daughter. Each testified that plaintiff told them she had lain on the floor and called for help "several times" before anyone came to assist her. She did not give either witness a timeframe of how long she had been on the floor, however. Even assuming this hearsay testimony would be admissible, it does not establish that defendant breached its duty to check plaintiff every two hours. Any such inference would be mere conjecture, which does not meet the burden necessary to prevent summary disposition. Plaintiff also contends that the testimony of the emergency room treating physician, Dr. Jones, established an issue of fact. But, Dr. Jones offered no testimony on whether plaintiff had lain on the floor for more than two hours and, in fact, assiduously avoided offering a firm opinion regarding the reason for the amputation.

During oral argument, plaintiff's counsel emphasized a fact that although set forth in plaintiff's statement of facts and attached as an exhibit, was neither argued nor addressed in the trial court, nor in plaintiff's appellate brief. Specifically, counsel advises that the Bureau of Regulatory Services of the Department of Consumer and Industry Services ultimately concluded that defendant had violated 1994 MR 3, R 400.15303(2),¹ but this "fact" is never legally analyzed or argued. Consequently, it is irrelevant to our resolution of this case. This Court need not address an issue not raised before and considered by the trial court because it is not preserved for appellate review. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). Moreover, even if this claim had been preserved, when a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Plaintiff alternatively argues *res ipsa loquitur* to allow the injury-causing event itself to establish negligence. See *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005). But, the mere occurrence of an injury is not evidence of negligence. *Shirley v Drackett Products Co*, 26 Mich App 644, 649; 182 NW2d 726 (1970). Although she need not eliminate all other possible causes, plaintiff must provide evidence from which reasonable persons can say that on the whole it is more likely than not that there was negligence. *Skinner v Square D Co*, 445 Mich 153, 159-165; 516 NW2d 475 (1994). The evidence submitted must take the inference out of the realm of conjecture. *Id.* at 165. Plaintiff's argument that she *could have been* left lying on the floor for an *indeterminate* period of time is merely within the realm of conjecture and does not make it more likely than not that negligence occurred. Therefore, plaintiff cannot avail herself of the doctrine of *res ipsa loquitur* here.

Plaintiff next argues that she should be entitled to show a genuine issue of material fact by use of an adverse inference because she was unable to locate two witnesses, specifically, defendant's former employees who were on duty on the night in question, for whom defendant had supplied their last known addresses. However, an adverse inference is only available where the missing evidence is under the other party's control. *Isagholian v Transamerica Ins*, 208 Mich App 9, 15; 527 NW2d 13 (1994). If it is equally available to both parties, no inference

¹ This rule provides: "A licensee shall provide supervision, protection, and personal care as defined in the act and as specified in the resident's written assessment plan."

should arise. *Id.* at 15-16. Although the women were employees of defendant at the time of the incident, plaintiff has failed to show they were under defendant's control at the time of this suit. See *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 809; 286 NW2d 34 (1979) (finding employee was not in party's control where he could have been subpoenaed by other party). Plaintiff is therefore not entitled to an adverse inference here. Plaintiff is therefore unable to establish a breach of duty by defendant. Summary disposition was appropriately granted on her negligence claim.

Because plaintiff failed to present evidence that defendant failed to honor its agreement to check on plaintiff every two hours, summary disposition of her MCPA claim was also appropriate.

We affirm.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Jane E. Markey